IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 358 OF 2020

ELIAS S/O LUCAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania)
At Shinyanga)

(Mkwizu, J.)

dated the 6th day of July, 2020

in

Criminal Appeal No. 14 of 2020

JUDGMENT OF THE COURT

5 & 11th July, 2023

MGEYEKWA, J.A.

This is a second appeal. The appellant, Elias Lucas, was charged in the District Court of Shinyanga with an unnatural offence contrary to section 154 (1) of the Penal Code, Cap.16 [R.E 2002].

It is essential, at the outset, to look at what transpired during the appellant's arraignment on 19th January, 2017. It was alleged that on 7th January, 2017 at Buhangija area within Shinyanga Municipality in Shinyanga Region, the appellant did have carnal knowledge of F.T (his

name withheld for purpose of protecting his dignity) a boy aged 16 years against the order of nature. When the charge was read over and explained, the appellant pleaded guilty to the offence and thus the trial court entered a plea of guilty.

Then the prosecuting Senior State Attorney narrated the facts of the case so far as the charge is concerned. Briefly, the learned Senior State Attorney stated them to be that: on the material date, the appellant who was with Masanja, met F.T. Thereafter, the appellant and Masanja decided to escort the victim to his home because it was night hours. The appellant convinced the victim and Masanja to accompany him to his house to close his door, they agreed and arrived at the appellant's house. Then the appellant told the victim to spend the night in his house until morning. The appellant told the victim that he will inform his mother about the sleepover, and the victim agreed. The appellant and victim shared one room while Masanja slept in the sitting room. At midnight, the appellant undressed the victim and started to have sex with him against the order of nature while he was asleep. To F.T, the experience was deadly painful, hence he cried for help. After hearing the screaming, Masanja entered into the appellant's room and found the appellant sodomizing the victim. Stunned by what he saw, Masanja reported the matter to the Police Station, and then the

appellant was arrested and arraigned before the trial court to face the charge.

After the facts were narrated, the appellant was asked whether the same were true or otherwise and his response was:-

> *"Your honour I heard the facts as read out by the prosecution. Your honour it is true I know Frank Thomas and we live on the same street, that it is true also on 7.01.2017, I met Frank and took him to my house while I was with my friend one Masanja Pius. That during midnight while the victim was asleep I undressed him and started to carnal knowledge him against his order of nature. That thereafter the matter was reported to the Police and I was arrested. That is all."*

The presiding Resident Magistrate took the view that the facts of the case as admitted by the appellant established the offence of unnatural offence. Accordingly, he convicted him of the offence on his own plea of guilty and proceeded to sentence him to thirty years imprisonment. Later that same day, the appellant filed a notice of intention to appeal to the High Court against conviction and sentence giving rise to Criminal Appeal No. 14 of 2020. Later on, he presented a Petition of Appeal to the High Court at Shinyanga. The appellant's first appeal to the High Court of

Tanzania at Shinyanga was unsuccessful. Hon. Mkwizu, J was satisfied that the facts the appellant admitted at his arraignment constituted the charged offence and, therefore, he was rightly convicted upon his own unequivocal plea of guilty.

Undaunted, the appellant lodged this second appeal. He advanced four grounds which can be paraphrased as follows, **one** that, the trial and first appellate courts erred in law to convict and sentence the appellant on his own plea of guilty while the material date and time on the charge sheet and preliminary facts differ; **two** that the first appellate court erred in law by upholding the conviction and sentence while the trial court sentenced the accused based on a non-existence section of 154 (1) 9 of the Penal Code; **three** that, the first appellate court did not consider ground number 5 of the appellant's petition which had merit in the law and only relied on the respondent's opposing submission; and **four** that, even if the appellant was convicted on his own plea of guilty still in the eyes of the law, the plea of guilty was equivocal and was not made at the preliminary stage before the trial.

At the hearing of the appeal, on 5th July 2023, the appellant appeared in person, unrepresented. The respondent, Republic was represented by Ms. Immaculate Mapunda, learned State Attorney. To start

off, the appellant prayed that we adopt his grounds of appeal and chose for the learned State Attorney to reply to his grounds of appeal but reserved his right to rejoin, if need would arise. The learned State Attorney stoutly resists the appeal and sentence. She began her submission by stating that the first and second grounds of appeal are new grounds because the appellant did not raise them at the High Court. However, she was of the view that the same raise legal issues.

On our part, we have critically studied the judgment of the High Court, and we are satisfied that the High Court did not decide on any matter touching on the complaints raised in the two contested grounds of appeal. However, we agree with Ms. Mapunda that the same raise legal issues worthy to be addressed by the parties.

On the first ground, Ms. Mapunda submitted that the facts of the charged offence, specifically paragraphs 7, 8, and 9 state clearly that on 7th January, 2017, the appellant sodomized the victim. Elaborating on this ground, she stated that the particulars of the facts number 2 narrate the whole incident, starting from the 6th day of January, 2017 when the appellant, Masanja, and the victim met, until the material date on 7th day of January, 2017 when the appellant sodomized the victim.

Turning to the complaint over the non-existence of the provision of the law, Ms. Mapunda acknowledged that in his judgment, the Resident Magistrate cited section 154 (1) 9 of the Penal Code which does not exist. According to her, the proper section is 154 (1) (a) of the Penal Code. She went on to state that the defect was minor, thus, the appellant was not prejudiced. Ms. Mapunda drew our attention to the sentence imposed on the appellant and stressed that the offence committed by the appellant attracts a life imprisonment sentence. Then, she urged this court to substitute the sentence of thirty years imprisonment with the statutory life imprisonment as provided for under section 154 (2) of the Penal Code.

The submission of Ms. Mapunda with respect to the second ground was briefly that, upon reading the first appellate court's judgment, she realized the first appellate court did not consider the fifth ground. However, the same did not crack Ms. Mapunda's stance in supporting conviction. She argued that, the first appellate court found that the appellant's plea was elaborative enough to ground a conviction. To bolster her proposition, the learned State Attorney referred the Court to section 228 of the Criminal Procedure Act, Cap. 20 [R.E 2022] (the CPA) which states that once an accused person admits the charges, his statement is recorded and the court imposes a sentence.

As regards the fourth ground, Ms. Mapunda weighed in stressing that the impugned conviction was soundly based on a perfect and unequivocal plea of guilty that the appellant made and the conviction of the appellant followed his unequivocal plea of guilty. She referred us to our previous decision in **Njile Samwel @ John v The Republic**, Criminal Appeal No. 31 of 2018 (unreported) where we reiterated the conditions for determining the unequivocality of a plea of guilty. It was her submission that, the Resident Magistrate followed the applicable procedure properly and that the admitted facts disclosed all the necessary ingredients of the offence thereby assuring the court that the appellant's plea was unquestionably unequivocal. In the premises, she prayed the appeal be dismissed in its entirety.

Consolidating his grounds of appeal, one of the critical challenges raised by the appellant is that the High Court had failed to direct itself on the date when the offence was committed. Before us, the appellant was certain that the incident occurred on 7th January, 2017, astonished the facts of the case show that the incident occurred on 6th January, 2017. He complained that he was neither allowed to explain the facts of the charge levelled against him. In urging us to allow the appeal, the appellant nervously stated that his plea of guilty to the offence at the trial court was

done out of confusion. He urged this Court to consider his age and substitute the sentence of thirty years imprisonment for a lenient sentence.

We have profoundly gone through the record of proceedings on the date the appellant was formally arraigned before the District Court of Shinyanga and considered the contending submissions by the appellant and the learned State Attorney to the proper sieve they deserve. We now turn to confront the grounds of contention in this appeal.

Addressing the first ground, at the outset, we find that as the law stands now it does not permit any appeal on one's own plea of guilty, except as to the extent or legality of the sentence. This is the gist and import of the provisions of section 360 (1) of the CPA. For ease of reference, we reproduce the section as hereunder:-

> *"360 (1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence".*

However, we are keenly aware that notwithstanding a conviction resulting from a plea of guilty, under certain circumstances an appeal arising thereof, may be entertained by an appellate court. These would

include situations where the plea was imperfect, ambiguous, or unfinished, appellant pleaded guilty as a result of a mistake or misapprehension, the charge levelled against the appellant disclosed no offence known to law, and upon the admitted facts, the appellant could not in law have been convicted of the offense charged. See **Rex v Forde** (1923) KB 400 at 403, **Laurence Mpinga v Republic** [1983] T.L.R. 166, and **Josephat James v the Republic**, Criminal Appeal No 316 of 2010 (unreported).

In order to properly determine the issues at stake in this appeal, it is essential that we reproduce the appellant's plea of guilty as recorded by the trial court on 19th January, 2017. It reads:-

> *"**Court**: Charge read over and explained to the accused person who is asked to plea thereto:*
>
> ***Accused pleads**: Your honor it is true, **I carnal knowledge F.T at my house.** (Emphasis added)*
>
> *Court: Entered as a plea of guilty.*
>
> *Sgd D. Luwungo, RM*
>
> *10/01/2017"*

Having closely scrutinized the charge at hand and its particulars as well as the facts of the charged offence as given by the prosecution, we are satisfied and would agree with Ms. Mapunda that the appellant's plea

was unequivocal and the statement of facts dearly disclosed and established all the essential ingredients of unnatural offence. After the charge was read to him, the appellant stated that "Your honour it is true I carnal knowledge F.T at my house". Then, the prosecution prayed for the court to read over the facts of the case since the appellant had pleaded guilty. The facts were read over and the same disclosed the ingredients of the offence. In the circumstances, there is no doubt that the appellant's expression by itself, constituted a cogent admission of the truth of the charge.

On the third ground, the record reveals that the first appellate court did not determine the fifth ground, however, reading the wording of the judgment, it is vivid that the appellant accepted as correct, all the facts which the prosecution narrated in support of the charge. The provision of the law, section 228 (2) of the CPA, clearly states that once an accused admits the truth of the charge, the Court proceeds to record his admission and the Magistrate shall convict him and pass a sentence. For that reason the first appellate court satisfied itself that the appellant admitted the truth of the charge, thus, the same sufficed to enter a conviction.

Addressing the fourth ground, the appellant questions the unequivocally of his plea of guilt. He complained that his plea was

equivocal and was made before the hearing of the trial. It is noteworthy that the plea in question was made after the charge and particulars were read out in a language that he understood. Thus, the trial court was satisfied that his plea was perfect, unambiguous, and complete admission of guilt to the offence he was charged with. For that reason, there was no need for the trial court to conduct a full trial. In our earlier decision in the case of **Sokoine Mtahali @ Chimongwa v The Republic,** Criminal Appeal No. 459 of 2018 (unreported), we cited with approval the case of **Adan v Republic** [1973] 1 EA 445, a seminal decision by the Court of Appeal for East Africa to which, the court considered the steps which should be followed to assure a plea is unequivocal. The Court held:

> *"... If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence..."*

Based on the above authorities, and after having scrutinized the charge, its particulars as well as the facts of the charged offence, we are satisfied that the statement of facts clearly disclosed and established all the essential ingredients of an unnatural offence.

In considering whether the trial Magistrate cited a non-existing provision of law, we are in accord with Ms. Mapunda's submission that the appeal records show that in his order, the Magistrate cited section 154 (1) 9 of the Penal Code. However, after going through the charge sheet, it is clear that the appellant was charged under section 154 (1) (a) of the Penal Code. Therefore, we find that the appellant's complaints could be resolved by using the slip rule, since the defect was a mere slip of the pen and the same is curable under section 388 of the CPA. We have also considered the fact that the appellant was not prejudiced. The charge was read over and the appellant pleaded guilty to it. Therefore, we decline the appellant's ground because the defect does not go to the root of the case.

Regarding whether the sentence of thirty years imprisonment which was imposed by the trial court and upheld by the first appellate court is erroneously, the answer is readily in the affirmation in view of the clear provisions of section 154 (2) of the Penal Code. Under that section, the appropriate sentence for the person who is convicted of committing an

unnatural offence against a person whose age is below eighteen years is life imprisonment. The above-referred section 154 (2) of the Penal Code provides that:

> *"(2) Where the offence under subsection (1)* ***is committed to a child under the age of eighteen years, the offender shall be sentenced to life imprisonment.****" (Emphasis added).*

It is therefore apparent from the above provision of the law, the presiding trial Magistrate erroneously imposed a sentence of thirty years imprisonment to a person who committed unnatural offence against a victim of below the age of eighteen years.

The learned State Attorney pressed us to quash the illegal sentence and impose the lawful one that of life imprisonment while the appellant impassioned pleaded us not to enlarge the sentence in the event the appeal is dismissed. We have found ourselves constrained to impose the lawful sentence for as of 19th January, 2017, the victim was below 18 years old.

In view of section 154 (2) of the Penal Code, it is clear that the sentence of thirty years imprisonment was erroneously imposed. The appropriate sentence is life imprisonment. Thus, we hereby substitute the

lawful sentence of life imprisonment as provided for under section 154 (2) of the Penal Code Cap.

In the upshot, this appeal is dismissed in its entirety for want of merit.

It is so ordered.

DATED at **SHINYANGA** this 11th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P.KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2023 in the presence of the Appellant in person and Ms. Rehema Sakafu, Ms. Rosemary Kimaro and Ms. Francisca Ntemi both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL